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No. 84-701

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent contends that the court of appeals' decision involves nothing more than an application of the Corps of Engineers' regulations to the facts of this case and a conclusion that the government failed to prove that Riverside's property is a "wetland" subject to the Corps' jurisdiction under those regulations. Were that all that the decision below entailed, the United States would not have sought this Court's review.[1] Contrary to respondent's representations, however, it is clear that the court of appeals' ruling

[1]We do not disagree with respondent's contention (Br. in Opp. 36-38) that the determination whether a particular parcel of land is or is not a "wetland" subject to federal regulatory jurisdiction presents a factual question the answer to which will vary from case to case. As explained in the petition, however, our concern is not so much with the particular factual determination in this case as it is with the erroneous analysis of congressional intent and principles of statutory construction employed by the court of appeals. Those errors will adversely affect future wetlands determinations within the Sixth Circuit and, because of the contrary principles employed by other circuits, result in inconsistent administration of the Section 404 program.

effectively invalidates a significant portion of the Corps' regulatory definition of "wetlands" and sets forth an erroneous interpretation of the Clean Water Act that conflicts with congressional intent and the interpretation of every other circuit to consider the issue. Accordingly, review by this Court is required to provide certainty in the administration of the nationwide Section 404 program.

1. a. As we noted in our petition (at 16 n.15), the court of appeals' interpretation of the Corps' regulation defining "wetlands" was plainly inconsistent with the regulatory language, which encompasses not only areas that are "inundated" by adjacent navigable waters but also areas that are "*saturated* by surface or *ground water* at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 323.2(c) (emphasis added). By focusing solely on inundation, the court of appeals effectively read the language relating to ground water saturation out of the regulation. Respondent's answer is to assert (Br. in Opp. 21, 23) that "this is an inundation case" and that "the question of saturation was not before" the court of appeals. Respondent's contention is erroneous. What was before the court of appeals was the question whether respondent's property is a "wetland" for purposes of federal regulatory jurisdiction; the regulation itself makes "saturation" as much a part of that inquiry as "inundation," and the court of appeals was not free to pick and choose from among the various components of the regulation, applying some but not others.[2]

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[2]Respondent bolsters its contention that this is only an "inundation" case by arguing that the evidence at trial focused on inundation. Respondent is correct, but the reason for that focus is that the regulation in effect at the time of trial required "periodic inundation" and did not mention the alternative of ground water saturation. 33 C.F.R. 209.120(d)(2)(*h*) (1976); see Pet. 7-9. When the regulation was amended, the United States asked the court of appeals to remand the case to the district court to consider the effect of the amendments. On remand, there was no need for the United States to introduce additional evidence relating to saturation (see Br. in Opp. 15-16) because the record made at the first trial clearly proved that respondent's property is in fact saturated by ground water. Indeed, respondent's own expert testified that the property supports wetlands vegetation because the type of soil drains poorly, resulting in a high water table and water near the surface (Pet. App. 24a-25a). Thus, saturation was never contested and, for that reason, the United States had no occasion to brief the issue before the panel. In its petition for rehearing, however, the government squarely presented the issue of saturation (Pet. for Reh'g 7-8). The court of appeals' response was to reiterate in even stronger terms its conclusion that the Clean Water Act requires inundation caused by frequent flooding from adjacent navigable waters as a prerequisite to the exercise of federal wetlands jurisdiction (Pet. App. 20a-21a). The court's failure to mention ground water saturation necessarily constituted a rejection of the saturation component of the Corps' regulations.

The wetlands vegetation and the saturated soil conditions that characterize respondent's property clearly bring that property within the applicable regulatory definition.[3]

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[3]Despite the contrary testimony of its own expert, respondent asserts (Br. in Opp. 22 n.6) that its property is not "saturated" for purposes of the "wetlands" regulation. Respondent supports this contention by arguing that the Corps defines "saturated" as "water to the soil surface." Respondent neglects to point out that its citation is to a *proposed* regulation that was never promulgated. 48 Fed. Reg. 21474 (1983). In any event, the proposed regulation indicated that the presence of "water to the soil surface" on even a temporary basis could constitute saturation. *Ibid.*

Respondent also suggests that its property is not saturated because a soil boring test indicated that the water table was nearly seven feet below the surface on "some portions of the land" (Br. in Opp. 22 n.6). Respondent fails to reveal that the portion of the land to which it refers was an area that had previously been filled, and not the natural ground surface (12/6/77 Tr. 27-31). Since the very purpose of depositing the fill material was to convert the saturated property to dry upland, it is not surprising that this "portion[] of the land" revealed a low water table.

b. Despite the fact that respondent's property clearly falls within the Corps' regulatory definition of "wetlands," respondent relies (Br. in Opp. 17) on the preamble to the Corps' regulations to argue that the decision below is in fact consistent with the Corps' own interpretation of its regulations. Like the court of appeals (see Pet. App. 9a, 11a-12a & n.3), respondent misreads the preamble. The language upon which respondent and the court of appeals rely states that "[t]he abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program." 42 Fed. Reg. 37128 (1977). The court of appeals observed that the presence of wetlands vegetation on respondent's property might be " 'abnormal' in the sense that [the vegetation] was supported not by inundation but by unusual soil conditions" (Pet. App. 12a n.3). This is not "abnormal" in the sense intended by the preamble. Rather, the preamble makes clear that the Corps' intent was to ensure that areas that were saturated or flooded in the past but are now dry would not be treated as wetlands, despite residual wetlands vegetation. 42 Fed. Reg. 37128 (1977). This is clearly not the case with respect to respondent's property; rather, that property, as it exists now, is an aquatic area demonstrating all the characteristics of a wetland.

In sum, it is clear that respondent's contention that the court of appeals merely applied the Corps' own interpretation of its regulations to respondent's property cannot be supported. On the contrary, the court seriously misconstrued the regulations, to the detriment of congressional intent.

2. Even more significant than the court of appeals' misreading of the Corps' regulations is its holding with respect to the reach of the Clean Water Act itself. As we noted in our petition (at 11, 15), the court of appeals utterly failed to consider the legislative history of the Act, which demonstrates conclusively Congress's intention that Section 404

jurisdiction extend to the type of property at issue in this case. Respondent makes the rather remarkable rejoinder (Br. in Opp. 29) that consideration of the legislative history by the court below was unneccessary in light of the extensive consideration given to that history in *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983). Respondent neglects to point out that the legislative history considered in *Avoyelles* led the Fifth Circuit to reach precisely the opposite result from that reached by the court below.

Respondent also attempts to defend the court of appeals' contraction of federal wetlands jurisdiction by asserting that "wetlands preservation was not an object of legislative intent" (Br. in Opp. 29-30). The legislative history of the 1977 amendments to the Clean Water Act flatly contradicts this contention; as we explained in the petition (at 13-15), debate on the 1977 amendments unequivocally demonstrates Congress's substantial concern with wetlands preservation and its ratification of the Corps' regulatory program. The court of appeals' decision frustrates Congress's deliberate decision not to restrict the scope of Section 404 jurisdiction, and it requires correction by this Court to ensure the fulfillment of Congress's purposes.

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

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